

May 24, 2002

**BY HAND**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: *Ex Parte* Presentation in CC Docket No. 98-146

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the Telecommunications Industry Rights-of-Way Working Group (I-ROW) submits this notice of an *ex parte* presentation in the above-captioned proceeding, and urges Commission action on the matters raised at the meeting described herein.

On May 17, 2002, the individuals listed in Attachment 1, hereto, representing the entities indicated, and on behalf of I-ROW, attended part of a meeting of the FCC Local and State Government Advisory Committee ("LSGAC"), at the invitation of its Chairman, Kenneth Fellman, in order to discuss local governmental practices involving access to public rights-of-way by telecommunications providers. Also in attendance at the meeting were Commission staff from the Wireline Competition Bureau (Emily Hoffnar, Jane Jackson, Christopher Libertelli, Eric Einhorn), the Wireless Telecommunications Bureau (Jeffrey Steinberg and Leon Jackler), the Media Bureau (Barbara Esbin), the Consumer and Governmental Affairs Bureau (Kris Monteith, Barbara Douglas, Richard Smith, Peggy Green), and the Office of General Counsel (Linda Kinney, Elizabeth Lyle, and Andrea Kearney). A copy of Mr. Fellman's invitation to I-ROW and the agenda for its May 17 meeting are included in Attachment 2, hereto.

After brief introductions, I-ROW began its presentation with a discussion of areas of common interest between industry and local governments involving rights-of-way management. Industry believes there is general agreement on many of the types of requirements sought by local governments relating to rights-of-way management. For example:

- We agree, on the need for basic information about the provider seeking access to the right-of-way – such things as name, address, contact information, and perhaps the type of corporate structure and date of incorporation – necessary to rights-of-way management;
- We also agree that governments can seek information about a planned project that is necessary to rights-of-way management, such as construction plans and other basic

engineering information about the project maintained in the ordinary course of business;

- Bonding and insurance requirements are also appropriate at levels commensurate with the risk and exposure, and that provide for some flexibility in these requirements and the types of security required;
- Provision for the imposition of remedies in the event of non-compliance with permitting requirements is appropriate;
- Safety procedures for lane closures, traffic control, utility location, and damage prevention, are also legitimate management functions;
- Finally, industry agrees that provision needs to be made for the restoration of damage caused by the construction process to return the right-of-way to substantially the same condition as before the construction, in the event that providers, after notice and an opportunity to cure, do not undertake remedial efforts themselves.

Industry is therefore supportive of local government entities permitting processes and regulations designed to efficiently and expeditiously administer these kinds of physical rights-of-way requirements that are directly related to the management of the right of way. We also believe that the development of a set of uniform rights-of-way management practices and procedures could contribute significantly to the ongoing debate concerning the use of public rights-of-way by members of the telecommunications industry.

As was recognized during the meeting, the devil is, of course, in the details. We therefore recommend that LSGAC participate in discussions with industry and other interested parties to develop a set of uniform rights-of-way management practices. We note that NARUC, through its Rights-of-Way Study Committee/Local Practices Subgroup, is presently addressing these same issues, and its recommendations are being presented for consideration at the NARUC Summer Committee Meetings in Portland. We believe those recommendations should be a starting point for rights-of-way management-related discussions. Attachment 3, hereto, is the current draft of the recommendations, which list certain activities as falling within the "sphere of appropriate rights-of-way management." These obviously would need to be fleshed out by the parties, but they do provide a useful starting point for discussion. We also disagreed with LSGAC's suggestion at the meeting that a separate, parallel process, redundant of NARUC's efforts, be initiated under the auspices of LSGAC.

In terms of process, we believe it critically important that any meetings concerning rights-of-way management following on NARUC's consideration of these issues, be under the auspices of a Commission-initiated proceeding, supervised and facilitated by Commission staff. We believe the goal of such meetings would be to develop a consensus document that the Commission ultimately adopts defining the scope of permissible management activities under Section 253(c) of the Communications Act.

At the LSGAC meeting, industry representatives also explained that broadband deployment is impeded when the permitting process is undefined and open-ended, or worse, is misused to delay construction while the locality seeks to extract from the provider unreasonable, unlawful fees or in-kind compensation, or seeks to impose unlawful third-tier local regulation on the provider's business and services. A locality charging fair and reasonable fees on a non-discriminatory basis has no need to negotiate fees with each provider individually and, therefore, no reason to hold up the construction permitting process while fees or other terms unrelated to actual rights-of-way management are debated.

We also briefly commented on LSGAC's argument that local government has a traditional property interest in rights-of-way akin to that of a private landlord, which would allow a governmental entity to charge rent-like fees. Industry believes there is overwhelming precedent rebutting this argument, and showing that localities hold rights-of-way in trust for the public benefit. That being said, the Commission need not resolve this issue to conclude that above-cost fees that some local governments seek to charge, and ones that reflect their monopoly power over rights-of-way access, is inconsistent with the mandates of the Telecommunications Act of 1996 ("1996 Act"). Rather, the industry believes that localities should be charging an amount calculated to: (1) administer the permitting process and any other actual and direct costs incurred by the locality directly resulting from the provider's use of the right-of-way; and (2) encourage, not deter broadband deployment.

Thus, the industry has not expressed concern with "paying *any* compensation for rights-of-way" access, as LSGAC has couched it, rather the industry's concern is with the use of rights-of-way by governmental entities as a revenue-generating device through the imposition of exorbitant per foot charges, percent of revenue fees, in kind payments, and other add-on fees. Instead, industry believes that Section 253(c) allows a local government to recover only the actual and direct cost it incurs directly resulting from the provider's use of the rights-of-way.

We also discussed how the rights-of-way practices of certain governmental entities are having a significant and demonstrable effect on deployment. While LSGAC, in its comments at the meeting and in various *ex partes*, continues to try to minimize, and question altogether, these impacts, the fact is that across the country carriers have had to delay projects or abandon them altogether in the face of the practices of certain governmental entities involving rights-of-way access.<sup>1</sup> In addition, as explained by representatives of Velocita, even a mere handful of

---

<sup>1</sup> Members of I-ROW and others have filed extensive comments in this docket, as well as with NTIA in its broadband proceeding, detailing numerous examples from around the country of rights-of-way practices of federal, state, and local government entities that have created significant barriers to the deployment of telecommunications facilities. This evidence demonstrates the obvious and common-sense correlation between abusive rights-of-way practices by various governmental entities, the resulting impacts on deployment activity, and the national scope of the problem. An extensive econometric study correlating "good rights-of-way laws" and more broadband deployment or "bad rights-of-way law" and less broadband deployment, as implied by LSGAC's comments, is clearly not required for the Commission to act to address this issue. Nor should the industry be required to satisfy some arbitrary threshold demonstrating that a particular percentage of all communities have created barriers to entry. In Section 253, Congress recognized that every community that creates a barrier to entry has a negative impact on the achievement of the goals of the 1996 Act, and thus requires action by the Commission.

jurisdictions can have a devastating effect on the deployment of a telecommunications network. This adversely affects the company itself, its lenders and investors, customers, and the numerous jurisdictions and their citizens that would have otherwise been served by these facilities.<sup>2</sup>

Overall, the industry believes that the proper model for rights-of-way access and pricing, and the one required by the 1996 Act, is one that “promote[s] competition and reduce[s] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage[s] the rapid deployment of new telecommunications technologies.”<sup>3</sup> That is, that public rights-of-way policy should enable the cost-effective deployment of new technology as widely as possible, to provide the greatest number of people access to broadband and advanced telecommunications services at competitive prices, and to stimulate economic development.

There is broad consensus that broadband and the underlying telecommunications networks necessary for these services are key economic drivers; thus, Congress recognized in enacting Section 253 as part of the 1996 Act that local, parochial interests should not be allowed to delay or unduly burden telecom deployment.<sup>4</sup> For this reason, Section 253 was written to preserve traditional local authority to manage the physical occupation of the public rights-of-way, and to collect fair and reasonable, non-discriminatory fees to offset the cost of that management, while empowering the Commission to preempt local requirements that exceed those bounds.

---

<sup>2</sup> A copy of an email from Velocita’s counsel to LSGAC elaborating on these concerns has been filed as an *ex parte* in the captioned docket.

<sup>3</sup> See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, Official Name (1996)(“1996 Act”).

<sup>4</sup> See *City of Auburn v. Qwest Corp.*, 247 F.3d 966, 980 (9<sup>th</sup> Cir. 2001)(quoting *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998))(emphasis added)(“*preemption [in Section 253] is virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. ‘Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications.’*”).

Ms. Marlene H. Dortch, Secretary

May 24, 2002

Page 5

For all these reasons, the industry urges the Commission to commence a proceeding to address governmental practices and fees that constitute barriers to entry under Section 253(a), including (1) delays in granting permits that prevent providers from providing service, particularly those related to refusals to issue permits in an effort to extract above-cost fees and other concessions unrelated to rights-of-way management; and (2) the level of compensation that local governments may require consistent with the "fair and reasonable compensation" standard in Section 253(c), which the Commission would later apply in resolving Section 253(d) petitions and to guide the courts. While we appreciate the opportunity to have discussions with LSGAC on these matters, at this point, direct Commission intervention and resolution of these issues is required.

Respectfully submitted,

By: \_\_\_\_\_/s/  
T. Scott Thompson  
Cole, Raywid & Braverman, LLP  
1919 Pennsylvania Ave., N.W.  
Suite 200  
Washington, DC 20006  
(202) 659-9750

By: \_\_\_\_\_/s/  
Martin L. Stern  
Preston Gates Ellis &  
Rouvelas Meeds LLP  
1735 New York Ave., NW, Suite 500  
Washington, DC 20006  
(202) 628-1700

*On Behalf of the Telecommunications Industry Rights-of-Way Working Group*

Attachments

cc: FCC Attendees  
Kenneth Fellman, Chairman, LSGAC

**Telecommunications Industry Rights-of-Way Working Group**

**Meeting with LSGAC**

**May 17, 2002**

**Industry Attendees**

<b><u>Company/Organization</u></b>	<b><u>Representative</u></b>
ALTS	Tiki Gaugler, Assistant General Counsel
AT&T	Frank S. Simone, Government Affairs Director
Cole Raywid & Braverman L.L.P.	T. Scott Thompson
Preston Gates Ellis & Rouvelas Meeds LLP	Martin L. Stern
SBC	Jarvis L. Bennett, Executive Director, Federal Regulatory
Sprint	Pete Sywenki, Director, Federal Regulatory Affairs
Velocita	L. Elise Dieterich, Kevin Minsky Swidler Berlin Shereff Friedman
Verizon	David L. Mielke, National Municipal Affairs Manager
WorldCom	Kevin P. Gallagher, Senior Counsel Karen M. Johnson, Associate Counsel

**FEDERAL COMMUNICATIONS COMMISSION  
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE**

Reply to: Kenneth S. Fellman, Esq.  
Kissinger & Fellman, P.C.  
3773 Cherry Creek N. Drive, Suite 900  
Denver, Colorado 80209  
303-320-6100 Telephone; 303-320-6613 Facsimile

March 26, 2002

Ken Fellman, Chair  
Mayor  
Arvada, Colorado

Marilyn Praisner, Vice-Chair  
Montgomery County Council  
Rockville, Maryland

Tom Armstrong, State Representative  
Marietta, Pennsylvania

Pamela J. Beery, Attorney  
Local Government Practice  
Portland, Oregon

Jim Dailey, Mayor  
Little Rock, Arkansas

Michael Guido, Mayor  
Dearborn, Michigan

Randy Johnson, Commissioner  
Hennepin County  
Minneapolis, Minnesota

Thomas Menino, Mayor  
Boston, Massachusetts

Nancy Nathanson, City Councilor  
Eugene, Oregon

Darryl T. Owens, Commissioner  
Jefferson County  
Louisville, Kentucky

Eric Reeves, State Senator  
Raleigh, North Carolina

Patrick Spears, President  
Intertribal Council on Utility Policy  
Fort Pierre, South Dakota

Steve Stovall, City Councilman  
Plano, Texas

David A. Svanda, Commissioner  
Public Service Commissioner  
Lansing, Michigan

Fran Ulmer, Lieutenant Governor  
Juneau, Alaska

T. Scott Thompson, Esq.  
Cole, Raywid and Braverman, LLP  
1919 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

*Re: FCC Local and State Governmental Advisory Committee /  
Industry Rights of Way Working Group*

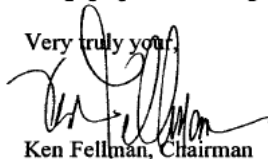
Dear Scott:

Thank you for sending me a copy of your recent letter to Chairman Powell, which responded to my letter to the Chairman on February 2<sup>nd</sup>. I am enclosing a copy of a follow up letter which I am sending to the Chairman today, based upon discussion at the LSGAC meeting last Friday. As you will note in that letter, the LSGAC would like to invite representatives of the Industry Rights of Way Working Group to meet with us during our next meeting on May 17, 2002. The meeting will be held at the FCC offices, although I am not certain yet as to a specific room within the building. As of this date, the Agenda is still somewhat flexible so if you are inclined to attend, please let me know as soon as possible a preferred time of the day.

In the past, the LSGAC has met and worked with other segments of the industry to address various issues relating to implementation of the Telecommunications Act of 1996. We hope that engaging in a dialog with representatives of the industry will provide a beneficial means of understanding each other's concerns, and finding an appropriate method to address outstanding issues in a manner that respects the rights of all parties.

I look forward to hearing back from you and determining whether your clients have an interest in engaging in this dialog.

Very truly yours,



Ken Fellman, Chairman  
Local and State Government Advisory Committee

KSF/eaj  
cc: LSGAC Members and Staff  
Dr. Emily Hoffnar, FCC

## **FCC LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE**

### **MEETING AGENDA**

Friday, May 17, 2002

\* \* \* \* \*

#### **LOCATION:**

**FCC Offices, The Portals, 445 12<sup>th</sup> Street S.W.**  
Commission Meeting Room (12<sup>th</sup> Street entrance level)

8:30 a.m.	Greetings & Introductions.
9:00 a.m. – 10:00 a.m.	LSGAC and Staff internal discussion of (1) cable modem and DSL proceedings; (2) NARUC ROW committee work; and (3) preparation for rights of way discussion with Industry Rights of Way Working Group (LSGAC, and its Staff only).
10:00 a.m. – noon	Meeting with Industry Rights of Way Working Group (LSGAC, its Staff, FCC Staff and invited guests only).
noon - 1:30 p.m.	Working lunch -- FCC and LSGAC discussion of various issues (LSGAC, its Staff and FCC Staff only). <ul style="list-style-type: none"><li>• Update from FCC Staff on status of cable modem, DSL, wireline deregulation and competitive networks proceedings [Jeff Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Jane Jackson, Associate Chief, Wireline Competition Bureau, Peggy Greene, Associate Chief, Media Bureau]</li><li>• Update on National Task Force on Interoperability (Marilyn Praisner, Randy Johnson, Mike Guido)</li></ul>
1:30 p.m. – 2:30 p.m.	Discussion of bankruptcy issues – legal and practical impact on state and local government when telecommunications companies file bankruptcy (LSGAC, its Staff and FCC Staff only).
2:30 p.m. – 3:00 p.m.	FCC complaint tracking issue – follow-up with FCC Staff on LSGAC letter identifying issues of concern (LSGAC, its Staff and FCC Staff only). [Thomas Wyatt, Deputy Chief, Consumer and Governmental Affairs Bureau]
3:00 p.m. – 3:15 p.m.	Break.
3:15 p.m. – 4:15 p.m.	LSGAC discussion of follow-up to ROW meetings, and possible advisory recommendation in cable modem and DSL proceedings (LSGAC and its Staff only).
4:15 p.m. – 4:30 p.m.	Upcoming meeting schedule/Other issues.
4:30 p.m.	Adjourn.



## ATTACHMENT 3

-----Original Message-----

**From:** Gallagher, Kevin

**Sent:** Tuesday, April 23, 2002 11:03 AM

**To:** Cartagena, Angel (PSC); Sharon Bywater; Bob Fogel; Carol Mathewson; Dave Draz; David Mielke; Ed Fox; Elizabeth Beaty; Elvis Stout; Emily Hoffnar; Jeff Arnold; Juan Otero; Marty Stern; Mary Joyce Gallagher; Michael Moss; Rick Maultra; Tim Hovis; Gene Fullano; Hale, LaWanda (PSC); Johnson, Karen; Kevin Minsky; Rick Wolfe; Ron Thaniel; Stacey Chaney; Gallagher, Kevin

**Cc:** 'dcpssc\_chair@juno.com'

**Subject:** NARUC Rights-of-Way State/Local Subcommittee

Chairman Cartagena,

As discussed during our April 11 call, this subcommittee could contribute significantly to the ongoing debate concerning the use of public rights of way by members of the telecommunications industry by developing a set of uniform right of way management practices and procedures. While the call highlighted some of the issues upon which local governments and industry members disagree, it also served to identify certain agreed-upon principles. The first is that it is appropriate for local governments to manage the use of their rights of way. The legislative history of Section 253 of the Telecommunications Act of 1996 and subsequent case law define the following activities as falling within the "sphere of appropriate rights-of-way management:"

- Coordination of construction schedules.
- Insurance, bonding and indemnity requirements.
- Establishment and enforcement of building codes and other public safety codes, including police and fire codes.
  
- The tracking of multiple systems that use the rights-of-way, to prevent interference among them.
- General time, place and manner of construction regulations.
- Issuance of permits prior to excavations or construction work.
- Vehicular and pedestrian traffic regulations.
- Relocation procedures.
- Requirements to repair streets to return them to their pre-construction condition.
- Applicant contact information.
- A proposed construction schedule and construction map.

Industry members and local governments together should develop the appropriate scope of each of these activities, keeping in mind the key principle that these regulations should be applied to all users of the rights-of-way, not just telecommunications companies, and that any costs resulting from such management activities must be allocated appropriately among all such users.

We also agreed that this management function should be administered, to the greatest extent possible, in a uniform and timely manner. The following practices should be adopted to accomplish these fundamental goals:

### ***Timing***

Government entities must act on a request for public rights-of-way access within a reasonable and fixed period of time from the date that the request for such access is submitted, or such request must be deemed approved.

### ***Clarity***

The specific steps and appropriate documentation (i.e., documentation must relate to ROW management, rather than the financial, technical, or legal qualifications of the provider) necessary to obtain a permit should be clear and in writing. Each agency or department involved in the process, and its specific requirements, should be identified. To the greatest extent possible, the agency or department that issues permits should be centralized, to avoid requiring multiple or duplicative approvals.

### ***Cooperation***

To the extent a local government needs to (1) alter the location of facilities placed in the public rights-of-way by telecommunications providers, utilities, or other persons; or (2) coordinate the placement of facilities in the public rights-of-way due to constraints on available space in the existing public rights-of-way, it must develop a process that will allow industry input to fully assess the issues and to develop solutions that accommodate both the government's concerns and each industry member's service goals and needs. To best facilitate a collaborative result, the local agency or department responsible for public right of way management should provide ample written notice of its concerns and its intention to develop a plan to address them, and it should provide opportunities for industry members to provide written and in-person comments. Any plan that is adopted should be flexible to accommodate changes in changes in an industry member's service goals. Cooperation and voluntary coordination between users of the public rights-of-way are appropriate; but mandatory requirements such as those imposed on telecommunications providers to construct or offer spare capacity to others, or to require a provider to use the facilities of another should be avoided.

### ***Fees***

The industry agrees that a local government is entitled to recover fees directly related to the costs it actually incurs to manage the right-of-way as a result of the telecommunications provider's activities in the right-of-way. However, local governments do not uniformly agree with the industry concerning the nature and amount of such fees. Consequently, issues relating to appropriate fees potentially create delays in the permit approval process. For this reason, permits should not be conditioned on the payment of fees; instead, the fee issue should be resolved in a separate process.